

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

LEON R. HOUSE, JR.,

Plaintiff,

**5:11-cv-915
(GLS)**

v.

**CAROLYN W. COLVIN, Acting
Commissioner of Social Security,¹**

Defendant.

SUMMARY ORDER

Pending before the court is claimant Leon R. House, Jr.'s counsel's motion for an award of attorneys' fees pursuant to 42 U.S.C. § 406(b)(1). (Dkt. No. 27; Dkt. No. 27, Attach. 1 at 1.) The Commissioner does not oppose counsel's motion, but requests that the court review the matter to ensure there is a reasonable result. (Dkt. No. 29 at 1-3.) For the following reasons, the motion is granted.

Section 406(b) of Title 42 of the United States Code authorizes a court to award reasonable attorneys' fees to a successful claimant's

¹ The Clerk is directed to substitute Carolyn W. Colvin, Acting Commissioner of Social Security, for defendant Michael J. Astrue, and amend the caption accordingly. See Fed. R. Civ. P. 25(d).

attorney, provided that those fees do not exceed twenty-five percent of the amount of past-due benefits awarded to the claimant. See *Gisbrecht v. Barnhart*, 535 U.S. 789, 807 (2002); *Wells v. Sullivan*, 907 F.2d 367, 370 (2d Cir. 1990). “[B]ecause a successful social security claimant evaluates and pays his own attorney, a court’s primary focus should be on the reasonableness of the contingency agreement in the context of the particular case.” *Wells*, 907 F.2d at 371. Section 406(b) does not displace any contingent-fee arrangement between the claimant and attorney, but rather sets the ceiling for an award under any such agreement at twenty-five percent of the past-due benefits. *Gisbrecht*, 535 U.S. at 792-93. Further, where fee awards are made under both § 406(b) and the Equal Access to Justice Act,² the claimant’s attorney must refund the smaller amount to the claimant. See *id.* at 796.

Here, in accordance with a fee agreement entered into between House and his counsel, (Dkt. No. 27, Attach. 2 at 17-18), counsel seeks payment of twenty-five percent of the past-due benefits owed, (Dkt. No. 27, Attach. 1 ¶¶ 4, 17). House’s past-due benefits amount to \$53,913.00,

² See 28 U.S.C. § 2412.

twenty-five percent of which is \$13,478.25.³ (Dkt. No. 29, Attach. 1 at 6.) House's attorney performed 44.2 hours of work before this court, (Dkt. No. 27, Attach. 2 at 33), and also, pursuant to a consent agreement between the parties, procured an award of fees in the amount of \$7,800.00 under the EAJA, (Dkt. No. 26). Counsel has indicated that, in the event that the court awards fees pursuant to § 406(b)(1), he will refund the smaller of the awards to House. (Dkt. No. 27, Attach. 1 ¶¶ 11, 14); see *Gisbrecht*, 535 U.S. at 794-95.

The Commissioner does not oppose counsel's request, and has stated that the amount sought "does not appear to be unreasonable[,] there is no evidence of fraud or overreaching," and "the requested fee award [is not] a windfall." (Dkt. No. 29 at 2 (citing *Gisbrecht*, 535 U.S. at 808).) The Commissioner also notes that counsel successfully procured fees pursuant

³ There is a modest discrepancy between the amount of fees requested in counsel's motion, and the amount actually withheld for attorneys' fees by the Social Security Administration. In his motion, relying on a notice of award dated February 15, 2014, (Dkt. No. 27, Attach. 2 at 22-29), counsel states that House's past-due benefits total \$54,739.00, and seeks fees in the amount of \$13,684.75. (Dkt. No. 27, Attach. 1 ¶ 6.) However, the February 15 notice did not provide the amount of past-due benefits, or contain the amount that would be withheld for attorneys' fees. (See generally Dkt. No. 27, Attach. 2 at 22-29.) Instead, the February 15 notice stated that, "[w]hen we decide how much you are due for this period, we will send you another letter." (*Id.* at 23.) Thereafter, another notice was generated, and sent on April 13, 2014. (Dkt. No. 29, Attach. 1.) This notice identifies the past-due benefits—\$53,913.00—and the amount withheld for attorneys' fees—\$13,478.25. (*Id.* at 6.) Accordingly, the court relies on the April 13 notice of award in determining the amount of attorneys' fees to which counsel is entitled.

to the EAJA, and that House will benefit by receiving the lesser of the EAJA or § 406(b) fees.⁴ (Dkt. No. 29 at 2-3); see *Gisbrecht*, 535 U.S. at 794-95.

The court agrees that \$13,478.25, twenty-five percent of the past-due benefits, is reasonable, given the hours expended and the fact that counsel secured a favorable outcome for House. There is no evidence of fraud or overreaching, and \$13,478.25 would not be a windfall to counsel. Thus, counsel's motion for attorneys' fees pursuant to § 406(b)(1) is granted.

Accordingly, it is hereby

ORDERED that the Clerk is directed to substitute Carolyn W. Colvin, Acting Commissioner of Social Security, for defendant Michael J. Astrue, and amend the caption accordingly; and it is further

ORDERED that counsel's motion for attorneys' fees (Dkt. No. 27) is **GRANTED** in the amount of \$13,478.25; and it is further

ORDERED that the Commissioner is directed to take the steps necessary to cause the amount of \$13,478.25 to be made payable to counsel from the fund of withheld past-due benefits, in compliance with the requirements of the Social Security Act and implementing regulations as

⁴ Awards under the EAJA are paid by the government. They are intended to reduce the high cost of litigation that may deter individuals from seeking review of government decisions. See *Trichilo v. Sec'y of Health & Human Servs.*, 823 F.2d 702, 704 (2d Cir. 1987). Awards under § 406(b), by contrast, are paid by the claimant out of past-due benefits.

interpreted by the federal courts, and in full satisfaction of the obligations imposed by this Summary Order; and it is further

ORDERED that the Clerk provide a copy of this Summary Order to the parties.

IT IS SO ORDERED.

November 20, 2014
Albany, New York

Gary L. Sharpe
Gary L. Sharpe
Chief Judge
U.S. District Court